EXHIBIT 100

166

Tribunal Arbitral du Sport
Court of Arbitration for Sport
CAS 2004/A/651

Appeal Partial Award

Pronounced by the

COURT OF ARBITRATION FOR SPORT
OCEANIA REGISTRY

Sitting in the following composition:

Panel:
Professor Richard H. McLaren (President).
The Honourable Allan W. McDonald QC
Henry Jolson QC

In the case of:

Mr Mark French

Represented by Mr Paul Hayes, Barrister
Instructed by Michael Main, Solicitor, Russell Kennedy Solicitors

Appellant

Vs

Australian Sports Commission

and

Cycling Australia

Represented by Mr Christopher Barry QC
Instructed by Mr Christopher Behrens, Mallesons Stephen Jacques Solicitors

Respondents

Court assisted by:

Mr Richard Redman, solicitor

Date of Award: 11th day of July 2005.

APPEAL AWARD

The Parties

1. Mark French, the Appellant {hereafter referred to by his surname French[1]}, is an Australian cyclist who entered into a scholarship agreement with the Australian Institute of Sport {AIS}. From November of 2002 he resided from time to time at the sports and residential facility of AIS at Del Monte located in Henley Beach, South Australia.

2. The First Respondent, the Australian Sports Commission {ASC}, is the national sports administration and advisory agency. Among various other roles, the ASC manages the Australian Institute of Sport.

3. The Second Respondent, Cycling Australia {CA}, is the national governing body of the sport of cycling in Australia and is a member of the international federation for cycling, Union Cycliste Internationale {UCI}.

The First Instance Decision

4. The ASC and CA each served infraction notices on French. In a letter dated 9 February 2004 from the ASC to French, the particulars of the alleged doping offences were set out. The alleged contraventions of the ASC Anti-Doping Policy were by the way of four particulars: *(1) Trafficking in a prohibited substance, namely glucocorticosteroid; (2) Trafficking in a prohibited substance, namely equine growth hormone; (3) Knowingly assisting a doping offence, namely assisting in trafficking glucocorticosteroid by others; and, (4) Knowingly assisting a doping offence, namely assisting in trafficking equine growth hormone by others.*

5. At first instance Arbitrator Holmes QC only found sufficient evidence to support his conclusion that the first two of the four particulars alleging breach of the ASC Anti-Doping policy had been breached. The third and fourth particulars were not established and they were not the subject matter of the rehearing or cross appeal. The first two particulars and the accompanying findings were the subject matter of this appeal by rehearing. However, at the conclusion of the evidence in the appeal, Mr. Barry QC, who appeared for the Respondents, stated in his submissions that the Panel should find that French did not commit a doping offence in contravention of the ASC Anti-Doping Policy. The effect of that submission was to remove from this appeal any consideration of any particulars in respect of the ASC Anti-Doping Policy.

---

[1] All other witnesses in this award are referred to by their surname after the first introduction of them by their full name in the award. All expert witnesses are referred to with their professional designation and surname after initial introduction. The barristers in the proceeding are referred to as "Mr." to alert the reader to the fact that they are the spokespersons of the parties.

6. The CA in a letter of the same date as that of the ASC, namely 9 February 2004, alleged breaches of its Anti-Doping Policy between 1 July 2003 and 1 December 2003. The alleged contraventions were: *(1) Doping by use of a glucocorticosteroid; (2) Doping by use of equine growth hormone; (3) Aiding, abetting, counselling or procuring Doping, or alternatively, being concerned in Doping for use of glucocorticosteroids by others and disposal of glucocorticosteroid waste products by others; (4) Aiding, abetting, counselling or procuring Doping or alternatively, being concerned in Doping, for use of equine growth hormone by others and disposal of equine growth hormone waste products by others; (5) Trafficking by buying glucocorticosteroid; (6) Trafficking by holding or acquiring equine growth hormone; (7) Admission of Doping of using glucocorticosteroid; and, (8) Admission of aiding, abetting, counselling or procuring Doping, of use of glucocorticosteroids by others and the disposal of glucocorticosteroid waste products by others.*

7. The second and the eighth particulars were found by Arbitrator Holmes QC not to have been established. The second particular with respect to Doping by use of equine growth hormone {eGH} was the subject of the cross-appeal by the Respondents permitted by two interlocutory rulings of this Appeal Panel, the discussion of which is set out below. The finding on the eighth particular is not being contested on appeal by anyone and is accordingly not a part of this proceeding. Therefore, the six remaining particulars of CA and their findings, being number one, and three through seven as numbered in the reasons at first instance, are the subject of this appeal by way of rehearing by the Appellant. The second particular is the subject of the cross-appeal by the Respondents in this appeal. Thus, there are only seven of the original twelve particulars of the ASC and CA under appeal in this proceeding. Of the five particulars not appealed and now abandon three were found to have been breached by the first instance Arbitrator.

Chronology of the Appeal

8. On the first Tuesday in December of 2003 room 121 at Del Monte previously occupied by French was being cleaned. The cleaners found a plastic bag of used syringes and needles in the cupboard and a bucket of the sort which normally contained protein powder, also containing used syringes and needles. That discovery was followed by an investigation that lead the ASC and the CA to serve infraction notices on French dated 9 February 2004. Hearings in relation to the matter were held in Sydney on 3, 4 and 7 June with a partial award issued on 8 June 2004. The final award was issued on 22 October 2004.

9. The CAS Oceania Partial Arbitration Award issued on 8 June 2004 found the Appellant to have breached the ASC Anti-Doping Policy and the CA Anti-Doping Policy. As a consequence of those breaches he was assessed a period of ineligibility of two years commencing on the date of the award and fined $1,000

Australian dollars. In the Final Arbitration Award dated 22 October 2004, French was further ordered to: (1) return to the ASC a trek road bike; (2) pay the ASC the sum of $12,031.37 for the financial assistance they provided to French; and (3) pay the sum of $20,000 to the ASC towards the costs of their proceedings. It is from these findings and consequences thereof that the present appeal is made.

10. An appeal was filed on 25 June 2004. Rule 51 of the Court of Arbitration for Sport {CAS} Code of Sports-related Arbitration (2004 ed.) {CAS Rules} requires the filing of an Appeal brief containing the facts and legal argument *together with all exhibits and specification of other evidence upon which he intends to rely* within 10 days following the expiry of the time limit for the appeal. That documentation was not filed until more than 5 months later on 20 December and was augmented up to within 7 days of the hearing. After the partial award at first instance had been issued, the Honourable Robert Anderson QC was appointed to investigate the allegations with respect to the involvement of other cyclists' in group injecting sessions {Anderson Inquiry}. The second and final report of the Anderson Inquiry was released on 27 October 2004 and in part contributed to the delayed filing of the Appeal brief.

11. CAS Lausanne appointed the President of the Panel on 20 October 2004. By that time the Respondents had appointed Justice Roger V. Gyles and the Appellant had appointed the Honourable Allan W. MacDonald QC. Justice Gyles was unavailable for any consultation whatsoever until the 6th of December. It was thereby made impossible to carry out the original intention to hold an appeal hearing in January of 2005. The President via telephone conference held a Directions Hearing on 24 November 2005. The previous day the Respondents had given advance notice of their intention to file a cross-appeal pursuant to the CAS Rules although they were not required to do so at this time in the proceedings.

12. Contemporaneously with the filing of the Appellant's appeal brief an objection was raised by the Appellant against Justice Gyles. He elected to recuse himself from the Panel on 20 December 2004. That meant there was absolutely no hope of a January hearing in this matter. Henry Jolson QC was appointed in his place on 25 January 2005 thereby reconstituting the Panel and enabling it to make rulings on the issue of the cross-appeal within the appeal process the argument for which had been completed in December.

13. The Interlocutory Rulings discussed more completely below had established a basis for an appeal hearing in March of 2005. Scheduling problems emerged when the Respondents advised that their cycling athlete witnesses to be called in the cross-appeal were unavailable until April or a later date due to their competition in the United States. Therefore an adjournment was a necessity. The Panel was unable to convene in April due to prior commitments and ultimately dates for the hearings were established in May. Mr. Weber QC, the barrister for the Respondents at first instance, had a conflict with the dates set by the Panel for

the Appeal hearing and Mr. Barry QC replaced him. At a Directions hearing convened by the President two weeks prior to the appeal, the parties requested additional days of hearings and raised the possibility of an adjournment that would have meant a further delay until July or August. The requests were refused and the appeal hearing was held as previously scheduled in late May.

The Appeal

14. On 25 June 2004 a timely appeal of the first instance Partial Arbitration Award was filed with the CAS Oceania Registry. That application now encompasses, of necessity, an appeal of the Final Arbitration Award of 22 October 2004.

15. The scope of the appeal had become controversial between the parties. The Panel was unable to deal with that controversy until it was reconstituted in late January of 2005. The Panel issued two interlocutory rulings dated 31 January 2005 and 30 March 2005 in which the Panel interpreted the CAS Code and prescribed the scope of this appeal. They are attached to form part of the reasons herein.

16. By the interlocutory rulings the Respondents were permitted to file a cross-appeal against the finding of the Arbitrator at first instance that the Appellant did not breach CA Anti-Doping Policy by committing a Doping offence by using eGH. The finding was that the particular was not proven or accepted. The cross-appeal of the Respondent relates to this single particular.

17. Through the interlocutory rulings, all parties were able to file new evidence before the Panel in the rehearing and cross-appeal that had not been called at the first instance. The Appellant and the Respondents both filed extensive new evidence before the Panel.

18. The Respondents' new evidence on cross-appeal by CA was provided in statements from Brett Lancaster, Graeme Brown, Shane Kelly, Jobie Dajka and Sean Eadie. All of these individuals are professional cyclists and have been, or still are, members of the Australian Track Cycling Team. Kelly, Dajka and Eadie are also members of the National Sprint Squad. All but Lancaster appeared in person before the Panel where they were subjected to cross-examination. Therefore, this Panel has the benefit of evidence not placed before the Arbitrator at first instance.

19. The Respondents also provided updated scientific evidence from Dr. Graham Trout, Ms. Alexandra Gavrilidis and evidence from Ms. Emma Sullivan. As a result, there was also additional and more recent scientific evidence before the Panel on the rehearing and cross-appeal.

20. The Appellant's new scientific evidence on appeal involved a certificate of Analysis of Professor Aishah A. Latiff, and scientific reports from Dr. Bentley Atchison, Professor Barry Boettcher and Dr. Dimitri (Jim) Gerostamoulos all prepared in April or May of 2005. In addition to this material there was also

filed: terms of reference for an investigation for the ASC and the CA by the Hon. Robert Anderson QC dated 24 June 2004; AIS Del Monte room assignments; statements of Neil Thompson and Shane Kelly both dated 29 June 2004 and included in the 2 July 2004 Report of the Anderson Inquiry; record of interviews in June of 2004 of cycling athletes Graeme Brown, Brett Lancaster, Jobie Dajka and Sean Eadie, all from Appendix II of the 2 July 2004 Report of the Hon. Robert Anderson QC; and statements from instructing solicitors by Karen Grima dated 15 March and 12 May 2005. It is self evident that none of the foregoing material was available in the first instance proceeding.

Jurisdiction of the Appeal Panel

21. The AIS entered into a Scholarship Athlete Agreement with French. By that agreement in clause 4.1.1 he agreed to comply with the ASC Anti-Doping Policy and agreed in clause 6.2.1.2 that he would disclose *full details of all medications, vitamins and supplements I take.* The original jurisdiction of the first instance Arbitrator derives from this contractual agreement and the ASC Anti-Doping Policy that provides at clause 4.10(a) that a CAS arbitrator will determine *whether the person has committed a doping offence* and if so what the sanction and its length ought to be.

22. The original jurisdiction of the Arbitrator at first instance also derives from the CA Anti-Doping Policy that provides for a Tribunal, which for a national or international level athlete is the CAS by clause 10.1(a).

23. The Appeal Panel has jurisdiction over this appeal by way of rehearing by clause 10 of the ASC Anti- Doping Policy and clause 12 of the CA Anti-Doping Policy. The scope of that jurisdiction is the subject of an interlocutory ruling issued by the Panel on 31 March 2005. No party disputes the jurisdiction of the Panel to hear the matter and make a final and binding determination.

24. The CAS Rules and Chapter 12 of the Swiss Private International Law Act of 18 December 1987 {PIL Act} govern these proceedings. The PIL Act applies to this rehearing by way of appeal as a result of the choice of Lausanne, Switzerland as the seat of the CAS Oceania.

25. As is permitted under Rule 58 of the CAS Rules the CA and the ASC have chosen as the applicable law that of the Australian State of New South Wales. In the first interlocutory ruling of 31 January 2005 this Panel concluded that the CAS Rules, by the virtue of Rule 55 and Rule 57, permitted as a matter of procedure the Respondents to cross-appeal. The interpretation of the Anti-Doping Policies of both the ASC and the CA is to be done within the law of Australia as found in the State of New South Wales and where applicable the Commonwealth of Australia. The procedural aspects of this appeal by way of rehearing and cross-appeal are governed by the CAS Rules as found in the Interlocutory Rulings of the Panel.

Procedural Aspects of the Appeal

26. Counsel for all parties agreed that the evidence as set out in the transcript of the first instance proceeding form a part of the evidence of this proceeding. Also included in that agreement was an understanding that all witness statements filed, together with the exhibits tendered, be part of the evidence in this proceeding.

27. It was agreed at first instance and applied in this appeal that the alleged contravention of both policies arose out of one course of conduct on the part of French over a period of time. While the Notice of Infraction is divided into several particulars, the appeal is to be determined on the understanding that the various particulars relate to a single composite activity and cumulatively amount to a single breach of the respective policies assuming there is any finding of a breach of the policies.

Background Facts

28. French was at the outset of these events an 18-year-old member of the junior cycling squad for CA. He held a scholarship with the AIS for the calendar year 2003. It was agreed by the Parties at first instance that the relevant period for the scholarship for the purposes of calculating the financial outlays to French commenced in June 2003 and was to be calculated at $12,031.37. He moved to South Australia just prior to taking up the scholarship and resided from time to time from November 2002 to December 2003 at the AIS facility Del Monte at Henley Beach in Adelaide. Athletes were allocated specific rooms although sometimes they changed their rooms.

29. Absence from the Del Monte facility occurred for a variety of reasons. On one occasion in July 2003 French and other members of the Australian team were in Buttgen, Germany. They were there as part of their training in preparation for the 2003 World Championships.

30. From late September 2003 to 1 December 2003 French resided at AIS Del Monte. For a period of one month beginning on 1 November he occupied room 121. From the 28th of November French was not actually living in that room but at his teammate Jobie Dajka's nearby home because he was in the process of moving elsewhere.

31. A plastic bucket and a plastic bag were found by the cleaners of room 121 on 2 December, 2003 the day after which French was no longer assigned the room at the AIS facility. The bucket contained, amongst other items, used protein supplements, which had been consumed by French. From around May to June of 2003 onwards, when the bucket had been emptied of its contents French had made it into the repository of used injectable items and empty phials.

32. The bucket and plastic bag were documented on the day they were found as containing 10/20 ml injection syringes, 1 ml insulin injection syringes, 25/26 gauge needles, 25 gauge butterfly needles, ampoules of Testis compositum N (German brand name) ampullen, Vitamin B and Vitamin C phials, Creatine (Pharmacia Italia), water phials, injectable Carnitine, 3ml injection syringes and swabs. Each of these items had been used.

33. Also in the bucket, there were some phials, the labels on which were torn in part, but the notation "For animal treatment only" was visible. French has maintained that these phials were not his. The chain of custody from the time of the discovery of these items through to the remainder of the proceedings did not meet the usual standards that would be applicable for a urine sample to be sent to a laboratory. Nor, were the standards met of preserving evidence, which might be seized in an investigation which may lead to forensic testing and examination. More will be said on the chain of custody when it becomes an issue in the course of the analysis in this award.

34. At first instance, French provided written and oral evidence indicating that he injected vitamins and supplements as a part of group injecting sessions in Del Monte. French alleged that the members of these group-injecting sessions varied and named *Messers* Shane Kelly, Sean Eadie, Jobie Dajka, Brett Lancaster, and Graeme Brown as participants in these sessions. All of them but Lancaster were cross-examined on statements filed in this appeal proceeding.

35. French in his statement at first instance stated that prior to moving to Del Monte, he had never injected any substance into his body. While at Del Monte, on one occasion when he was feeling a bit run down from the training, he approached the head coach to ask if it was possible to ask the team doctor *to get a shot of Vitamin B*. The head coach responded that he could ask but it was unlikely that the team doctor would do so. French states that Eadie overheard this conversation and volunteered to inject him. French was told that injecting vitamins is better than taking oral tablets.

36. In the cross-examination at first instance, French stated that he continued to receive injections from Eadie in Eadie's room on almost a weekly basis for the next few weeks. On or about the third occasion, French states that he noticed Eadie was injecting himself with some other substance than that with which he was injecting French. French maintained that he did not inquire into the nature of the substance being injected by Eadie as he was not interested in what Eadie was using.

37. Further in the cross-examination, French was not sure but about on the fourth occasion he received an injection from Eadie, Kelly joined their company and both Kelly and French received an injection from Eadie in Eadie's room. French first injected in his own room in about early June 2003 because they couldn't get *a private moment* in Eadie's room. Eadie injected French a couple of times in

French's room before French left for Germany on 1 July 2003. French admits that he told Eadie where his bucket was and Eadie discarded the injectable waste material from injecting French into his bucket.

38. On one occasion shortly before leaving for Germany on 1 July 2003, French said that he received an injection of a product known as "Testicomp" from Eadie. In his statement at first instance, French states that he was advised that *the product was fine as it was just a vitamin supplement that would prevent* [him] *from becoming run down by the heavy training regime.* When French went to Buttgen, Germany, he asked Eadie where he could obtain Testicomp. A few days later, French states that Eadie showed him and Kelly where Testicomp could be purchased and French did go and purchase Testicomp for himself and Kelly. The purchased Testicomp was alleged to have been split later between French and Kelly at the training facility in Buttgen.

39. While in Germany, French states that he injected Vitamins once a week and it was always done in the company of others. The other cyclists French named included Brown, Lancaster and Eadie. In Germany, Eadie injured himself and was sent home. In the cross-examination at first instance, the first time French admits to self-administering vitamins is in Germany after Eadie had left.

40. French returned to Del Monte on 13 September 2003. During his absence from Del Monte, the bucket was stored in his house in Melbourne. When French returned to Del Monte, he brought the bucket back with him from Melbourne. Once in Del Monte, French freely admitted that from September to December 2003, he and one or two other athletes regularly used his room to inject themselves. French named Dajka as one of the participants once the injecting sessions resumed in Del Monte. In the cross-examination at first instance, French further said that on one occasion he definitely injected at Dajka's house and while they were in Perth. While at Del Monte, French said that the others presumably bought whatever they were injecting with them. French said that he did not see what the others were injecting because the cyclists injected in different parts of his room. In his statement at first instance, French admits that what he was doing was an *open secret, it* [was] *visible to those involved but hidden away from those who did not take part.* In the cross-examination, French said *he was always told to not consult Dr. Barnes.* Dr. Barnes is the medical doctor for the CA Track Cycling Team at its Del Monte location. French further said that he locked his door when the injecting sessions took place.

41. It is as a result of much of the foregoing evidence at first instance that the Anderson Inquiry was established. The report summarizing his findings was published on 27 October 2004.

STANDARD OF PROOF

42. The Appellant submits that pursuant to the Australian authority of *Briginshaw* v. *Briginshaw*[2] and CAS jurisprudence, the standard of proof required to be met by the Respondents is somewhere between the balance of probabilities and beyond a reasonable doubt. The Appellant further submits that although the CAS jurisprudence itself is silent on the issue, *Briginshaw* further stands for the proposition that the more serious the offence, the higher level of satisfaction the Panel should require in order to be satisfied of the offences charged. It is further submitted that given the serious allegations with respect to trafficking and aiding and abetting, and the consequences thereof, a very high standard almost approaching beyond a reasonable doubt is required for the Panel to accept that the offences have been proven. The Panel accepts that the offences are serious allegations and that the elements of the offence must be proven to a higher level of satisfaction than the balance of probabilities.

TESTIS COMPOSITUM N or TESTICOMP

43. In preparation for the first instance hearing French made a signed written statement on 28 May 2004. In paragraph 24 thereof he states: *I was told by Sean Eadie that Testis compositum could be purchased at a nearby pharmacy. I purchased a box of Testis compositum ampules from a pharmacy in Buttgen, Germany over the counter without a prescription. While in Buttgen, I also bought injectable vitamins B and C.* For his part, when cross-examined on the above statement by the counsel for French on the appeal, Eadie on cross-examination simply stated: *that's not true.* He denies ever suggesting to French to use Testicomp. He denies ever purchasing Testicomp in Buttgen, Germany or ever using the product. To the extent this Panel must prefer the evidence of one athlete to the other we note that Arbitrator Holmes QC made limited findings against the credibility of French. We find that the evidence of Eadie before us is at its best unreliable. Therefore, we would prefer the testimony of French to that of Eadie.

44. French admits to injecting himself with Testicomp from once a week to once a fortnight after purchasing the substance in Germany. He returned from Germany with the product and continued the injections in Australia. The waste products from the Testicomp injections were placed in the bucket when he was in Australia.

45. In a statement prepared for the first instance hearing, Dr. Barnes advises that the information leaflet that accompanied a used packet found in the bucket indicated the product contained amongst other ingredients *Cortisonacetat Dil.* Dr. Barnes indicated that the substance is a glucocorticosteroid which is prohibited for use by injection under the UCI and therefore, under the CA Anti-Doping policy.

46. Dr. Graham Trout is an Analytical Chemist and the Deputy Director of the Australian Sports Drug Testing Laboratory {ASDT Lab} a position he has held

[2] (1938) 60 CLR 336.

since 1996. Dr. Trout has prepared several statements, both at first instance and before this Panel. He prepared a report for the first instance hearing filed 16 December 2003 and then updated that report in a statement filed before this Panel dated 25 February 2005. His first report confirmed that there were some items in the bucket that contained eGH. His second report dated 30 September 2004 expanded on the analysis undertaken in his first report. The third report dated 26 October confirmed that a needle marked N6, was heavily contaminated with eGH. A fourth statement dated 25 February 2005 summarized his analysis regarding Testicomp and eGH. Finally, on 16 May 2005, Dr. Trout wrote a letter in response to the reports filed by Prof. Boettcher who is an expert witness for the Appellant. Dr. Trout who appeared before us by videoconference testified in his cross-examination that he was never asked by the Respondents to test, and did not test, the used phials in the bucket to determine if they contained remnants of a corticosteroid. Therefore, there is no ASDT Lab evidence before this Panel that the contents of the phials in the bucket did contain the prohibited substance cortisone acetate that would be a glucocorticosteroid as described in the leaflet.

47. The CA Anti-Doping Policy provides a definition for Doping and a Doping Offence.

> *"Doping" means:*
> *(a) the use of an expedient (substance or method) ...*
> *(b) ...*
> *prohibited by UCI...*
> *"Doping Offence" means and includes:*
> *(a) Doping;*
> *(b) ...*
> *(c) Trafficking*
> *(d) ...*
> *(i) (1) aiding, abetting, counselling or procuring;*
> *(2) ...*
> *(3) being in any way, whether directly or indirectly concerned in, or party to; or*
> *(4) conspiring with any other person to effect;*
> *any of the practices descried in paragraphs (a) – (h) of this definition.*

In applying the foregoing definitions it is necessary to determine what CA must prove to secure the conclusion that there has been a breach of their Anti-Doping Policy. A Doping Offence occurs if there is use of a glucocorticosteroid. Does the verb "use" require an interpretation that *mens rea* be an element or does the word "use" create strict liability? In sporting matters involving anti-doping rules the approach of strict liability has normally been the case[3]. However, before one

[3] See the commentary by Adam Lewis & Jonathon Taylor, *Sport: Law and Practice*, (Great Britain: Butterworths, 2003) at 950 accompanying the discussion of *USA Shooting & Quigley v Union Internationale de Tir* (CAS 94/129) where the CAS Panel enunciated the rationale for strict liability as follows. Requiring the governing body to prove fault: (1) would be unfair to the competitors in the tainted

reaches that issue, it is required that what French admits to using, Testicomp, must first be proven to have within in it the prohibited substance and second he must be shown to have used it.

48. It is a basic element of possession that there must be a finding of fact as to the specific material "possessed" by French and that it contain the glucocorticosteroid. The CAS Oceania case of *AOC* v. *Eadie*[4] is directly on point. Eadie was alleged to have trafficked a prohibited substance by importing it into Australia. The imported package was either destroyed or returned to sender and accordingly, tests of its contents were unable to be undertaken. In those circumstances, the Hon. Justice Cripps in his capacity as an Arbitrator stated at paragraph 32 on p. 8 of his award:

> *"Beyond knowing that someone in Customs Service said that the parcel in January 1999 included in it tablets 'containing APP* [anterior pituitary peptide, a prohibited substance] *that is all that I know about the substance".*

and further on at paragraph 37 on p. 10 of his award:

> *"The plinth upon which the case against Mr. Eadie rests is the assumption that, the Court should conclude that the untested and unanalysed tablets in fact contained APP".*

Justice Cripps went on to say that Eadie was not shown to have been untruthful and applied the standard of proof identified in *Briginshaw* v. *Briginshaw, supra,* to hold that he was not satisfied that in January 1999 Eadie imported a prohibited substance into Australia

49. It is the submission of the Appellant that *the fact a label on a container states that the substance in the container is or contains a prohibited substance, does not of itself prove that the substance in the container actually is or actually contains a prohibited substance, nor does it relieve the Respondents of their responsibility to do so.* The Respondents submit that it is not helpful to look at criminal law for the analysis. Rather the inquiry should be one of what the contract provided for and the commercial context of the contract in relation to what the parties were agreeing to do. It is a further submission of the Respondents that the admission of the use of the Testicomp, which lists *Cortisonacetat Dil* (a glucocorticosteroid) as an ingredient, is an admission of a breach of the policy and the Panel should find that the breach is established. For the reasons set out below the Panel accepts the submission of the Appellant.

50. French in his statement admits injecting Testicomp thereby establishing "use". But what is it that he actually used? A laboratory analysis for

---

event; (b) would probably be too difficult to prove and therefore would open the floodgates to drugs cheats; and (c) would certainly be too expensive to prove. See also generally *A v. FILA* (CAS 2001/A/317), *L v. FINA* (CAS 95/142), *AC v. FINA* (CAS 96/149), *Bernhard v. ITU* (CAS 98/222), *Raducan v. IOC* (CAS 0G00/011), *C v. FINA* (CAS 95/141).

[4] (A4/2004) Partial Award 21 July 2004. The individual involved in that case was a witness in this appeal.

glucocorticosteroids being on or in the contents of the bucket was never undertaken on behalf of the Respondent in contrast to the eGH where a laboratory analytical process was undertaken. The information leaflet that accompanies the product states that it contains Cortisonacetat Dil, which is a glucocorticosteroid. However, as was held in *AOC* v. *Eadie, supra,* the label by itself is insufficient to establish a finding of fact that the specific material "possessed" by French contained the glucocorticosteroid. The only evidence before the Panel is that when the Appellant had a sample from the same batch as that in the bucket of the product Testicomp tested by the Doping Control Centre in Penang, Malaysia the test results were *"negative for Corticosteroids"* as attested to by Professor Aishah A. Latiff, Director, Doping Control Centre Penang. The Respondents did not require him to be called for cross-examination and therefore, he was not cross-examined on his findings as certified. In his statement before the Panel, Dr. Trout confirms Prof. Latiff's conclusion and indicates that: *As far as* [he is] *aware there is no scientific test capable of detecting glucocorticosteroid in such small quantities and, accordingly* [he is] *not surprised by Professor Latiff's tests conclusions.* The thrust of this evidence leads to the conclusion that either the product is mislabelled or there is no scientific test that can establish the prohibited substance as being within the product as sold. In either case there is no prohibited substance that can be proven to be within the product Testicomp.

51. The Respondents' submission is to the effect that the proof of the contents of the bucket containing the glucocorticosteroid as a prohibited substance is not required because of the admission of the use of Testicomp by French was a breach of his contractual duties. The Panel finds that an admission to use of Testicomp does not amount to an admission that there has been use of a prohibited substance unless the product used is shown by chemical analysis to contain that which it purports to contain by its product leaflet. The contents itself must be proved to have contained the prohibited substance and that was not proved. An admission of use of Testicomp does not factually prove the fact of what it is that has been used and that it contains the substance stated on the label. It is at best hearsay evidence. Although the Panel is not bound by the rules of evidence, having regard to the seriousness of the allegation and the consequences that would follow upon a finding of doping, we find we should not act on the admission alone. As indicated above in the statements filed by Dr Trout and Prof. Lattiff, the only evidence before this Panel is that the product Testicomp is negative for the presence of a prohibited substance. Therefore, it is found that it is not established to the necessary degree of satisfaction that the product Testicomp did in fact contain a prohibited substance or that French used a prohibited substance by using Testicomp.

52. Based upon all of the foregoing, all of the particulars relating to the use of Testicomp have not been proven because the material admitted to have been injected has not been shown to any degree of satisfaction to contain the prohibited substance. Therefore, this Panel cannot find that a breach of the CA Anti-Doping

Policy has occurred. All the particulars in relation to Testicomp are dismissed as not established.

EQUINE GROWTH HORMONE {eGH}

53. In contrast to Testicomp, a lab analysis was done on the contents of the bucket to establish if there was eGH in the remnants of some of the discarded materials in the bucket. The CA Anti-Doping definitions previously quoted require the Panel to determine if French used eGH and/or that he trafficked in the prohibited substance or that he aided, abetted, counselled, procured, used or disposed of eGH.

54. Dr. Barnes in his statement at first instance indicated that he took possession of the plastic bag and bucket and its contents on 3 December 2003 after the meeting with French. He sent the thirteen clear phials with torn labels for analysis at the Australian Sports Drug Testing Lab {ASDT Lab}. The remaining materials were stored in a filing cabinet in his home and later at the Forensic Science Laboratory in Adelaide. Through various inquires he determined that the clear phials with torn labels had held a product known as EquiGen manufactured in Australia. French during his cross-examination at first instance denied ever using eGH; or, indeed, any performance enhancer. He also denied any knowledge of what the other athletes were injecting in his room. When asked whether he knew if other athletes were using equine growth hormone in his room he answered *I have no knowledge – I never took notice of what anyone brought in.*

55. Dr. Trout in his reports of 16 December 2003 and 30 September 2004 stated that the chemical analysis of EquiGen revealed that it contained eGH. He confirmed these findings on cross-examination before this Panel. Therefore, unlike the substance Testicomp, there is evidence that the phials found in the bucket contained a prohibited substance, i.e. eGH. It is being undisputed that the substance is a prohibited one under the CA and UCI Anti-Doping Rules.

56. The appeal hearing proceeded by way of a rehearing. French did not, nor did he have to, testify before the Panel. His evidence at first instance was unshaken on cross-examination and the Arbitrator did not specifically find against the credibility of French. Although French was not cross-examined before us we have considered his statement and his cross-examination at first instance together with all of the additional evidence available to us to form our own views of the evidence. We do not rely upon the Arbitrator at first instance as to his assessments of French and the evidence before him.

57. Considerable additional evidence was introduced before this Panel by both of the parties during the process of this appeal. The Panel must now proceed on the basis of the whole of the evidence that is before it. The Panel has the athletes' answers to the allegations that were made by French at first instance. Therefore,

this Panel is in a better position to make an assessment of whether the Anti-Doping Policy of CA has been breached. There are three particulars requiring discussion: (i) use; (ii) trafficking; and (iii) aiding, abetting, counselling, procuring; or being concerned in use or disposal: in relation to eGH. The totality of the evidence needs discussion in relation to each of these particulars.

(i) Use

58. The particular at first instance on *use* under the CA Anti-Doping Policy was found to have *not been established* and was the subject of the cross-appeal before this Panel. The definition for Doping and a Doping Offence are set out in paragraph 47 and discussed in the subsequent paragraphs. For present purposes, the strict liability principle used in connection with a laboratory analysis of a urine sample does not require "knowing possession"[5] of eGH. However, in the absence of evidence of the presence of a prohibited substance in the athletes body, such as a urine sample and its laboratory analysis, what is required to be proved is the use of the prohibited substance itself. Here there is both direct testimony of various cycling athletes and scientific evidence purporting to establish the fact of use. The question remains, "by whom?" Mr. Barry in his submissions concedes *that there is no direct evidence that Mr French used the material in the sense that no-one saw him use it and he has consistently denied that he did use it. It becomes a matter of inference.*

59. In his statement and from his evidence at first instance French admits to injecting vitamins, supplements and Testicomp but denies injecting eGH. He admits to injecting these substances in the company of other athletes but testified and stated that he was unaware of any AIS athlete, who was present with him injecting eGH.

60. Cycling athletes Brown, Dajka, Eadie and Lancaster filed statements in this proceeding in answer to allegations of French in the first instance proceedings. All cyclists except Lancaster were present and cross-examined before the Panel. Kelly filed a statement originally prepared for the Anderson inquiry and presented himself for cross-examination.

61. In his statement, Lancaster, the roommate of French in Buttgen, Germany stated that French and Brown intravenously self-administered substances in their shared room in Germany. He assumed they were both injecting approved vitamins and supplements. Brown in his statement admits to self-injection of vitamins and

[5] *Tori Edwards* v. *IAAF & USATF* OG 2004/003. In that case, the athlete sprinter admitted that she had committed a doping offence by mistake and accordingly argued that "exceptional circumstances" existed to allow for reduction or elimination of the sanction. The source of the prohibited substance in her body were two glucose tablets which, unbeknown to her and her therapist, contained the prohibited substance. In dismissing her appeal, the Panel noted that *there is an obligation and a duty on an elite athlete to ensure that no prohibited substance enters his/her body, tissues or fluid. On balance, the Panel finds that there was negligence in failing to inquire or ascertain whether the product contained a prohibited substance.* Therefore, in strict liability cases, there is no requirement to prove that the athlete was in knowing possession of a prohibited substance.

supplements, but only in Germany and makes the same assumption about what French was injecting. In cross-examination Brown reaffirmed his assumption. Thus, other athletes admit to self-injecting but their evidence only goes to their having done so in Buttgen.

62. In response to French's statement and testimony at first instance, Eadie denies any involvement or knowledge of group injecting activities at AIS in Del Monte. For less than two weeks in Buttgen, Germany, Eadie was the roommate of Brown and in cross-examination denied any knowledge of injecting activities that took place in Buttgen, Germany in that he was not in the room when any of this may have taken place. His denial must be considered in the light of the fact that this Panel finds Eadie to have been a very unsatisfactory witness whose testimony strains credulity. We also have the testimony of Brown who in the cross-examination when asked whether Eadie was present during the injecting sessions in Germany, in a sarcastic response stated: *That's a pretty good chance, we were sharing a room.* This statement flies directly in the face of the blanket denials of Eadie and further diminishes his credibility as a witness.

63. French alleges that Eadie introduced him to the practice of injecting vitamin and other substances. Eadie categorically denies French's version of these events both in his statement and in his cross-examination. Eadie further states he has never seen French self-injecting. In sum, Eadie denies each and every allegation in French's statements and testimony. He maintained his denials before this Panel during cross-examination.

64. While the cyclists were in AIS Del Monte only Kelly and Dajka admit to injecting in French's room. Kelly, in his statement prepared for the Anderson Inquiry and made part of these proceedings, states that French approached him to self inject vitamins B and C in French's room. Kelly states the only time he self-injected he was given a syringe containing vitamins B and C and he injected himself in the bathroom in French's room. French disposed of the used paraphernalia and materials.

65. Dajka's statement before this Panel states that French offered him an injection of vitamin B. Dajka admits to self-injecting in his room at Del Monte a dose from a syringe that French had prepared. Dajka alleges that French disposed of the waste material when he had finished injecting. Dajka suspected he received a horse vitamin injection. In his statement he says: *I cannot clearly recall, but there may have been a reference to "horse" on the large bottle from which Mr. French drew the liquid Vitamin B.* He states that he recalls seeing *two transparent phials sitting on the top of Mr. French's refrigerator. The phials appeared to me to be empty. I recall touching one of the phials. I did not see any label on the phials and I did not discuss the presence of contents of the phials with Mr. French.*

66. There is no fresh evidence before the Panel from French. Mr. Barry submits that French's denial of knowledge and of use of eGH should be rejected because he

has given inconsistent explanations as to his knowledge and awareness of the phials. He further submits that the evidence of the other athletes that they did not use it means that by the process of exclusion French must have used eGH.

67. French's inconsistent explanations at an early stage in the initial investigation are not sufficiently consequential to reject his denial. It is the statement of Mr Martin Barras, who is the cycling team coach, that says when French was first confronted with the eGH phials French stated that the phials were not his but came from Melbourne. French has denied ever making such a statement. The Panel finds the alleged inconsistency is merely the result of poor communication of questions and answers.

68. The Panel is not prepared to accept the blanket denial of Eadie with respect to everything that French says and Eadie's denial of his own conduct. We find him to have been a very unsatisfactory witness. It is interesting to note that in the cross-examination before this Panel, Eadie admits to first begin self-injecting intra-muscular vitamin injections in January 2004, a month *after* the French saga began and never during 2003 which is the period in which the particulars against French are rooted. The normal and reasonable reaction of the ordinary athlete would have been to do the exact opposite during this time of heightened awareness and not injected oneself after the matters concerning French came to light. The explanation that such public awareness spurred Eadie on to self inject for the very first time in 2004 strains his credulity in the extreme. His testimony is highly implausible considering the totality of the evidence. Further, the Panel also does not accept the self serving testimony of Dajka and his introduction of statements for the first time in this proceeding of seeing empty phials on the refrigerator in French's room and touching the same. Furthermore, Dajka states he recalls a reference to the word horse on the bottle from which French drew the liquid Vitamin B. These are convenient explanations to explain the DNA evidence (discussed in greater detail below) connecting him to the bucket. Dajka was also been found to have lied to the Anderson Inquiry and has suffered some consequences for doing so.[6] The other athletes in their testimony admit to injecting in either Del Monte or Buttgen, Germany but deny that any of those injections relate to eGH. Therefore, on the findings of the evidence made by the Panel the process of exclusion referred to by Mr. Barry in his submissions is at best incomplete.

69. The complete open access to French's room must also be considered in assessing his denial of knowledge of the phials in the bucket containing eGH. The Appellants submit that it is implicit in the Arbitrator's decision at first instance that the Arbitrator accepted that French allowed others to inject vitamins and supplements in his room at Del Monte, and to use French's waste-bucket to dispose of their injectable waste and paraphernalia. At this rehearing, it is submitted by the Appellant that because the cyclists live in a college style dorm

[6] See the decision of *Dajka* v. *AOC* dated 12 August 2004. It is this decision of Justice Gyles that gave rise to the objection in December of 2004 to his being a member of this Appeal Panel.

with doors open, anything can happen, with other people having the opportunity to deposit the eGH phials in French's room. There is evidence before this Panel that Dajka frequented French's room while French was absent. French used to leave his keys in a hidden location for the use of Dajka. Kelly admits to going into French's room at least once and indeed injected himself with Vitamins on that occasion. There is also the evidence from Eadie that it is possible that he accessed French's room during the week of 25 November 2003 to 2 December 2003 when French was not there. Therefore, before this Panel there was considerable evidence that at least some other athletes had open access to French's room in his company and occasionally in his absence. This again speaks to the process of exclusion referred to by Mr. Barry.

70. On a careful overall evaluation of the all of the direct testimony before this Panel we cannot conclude that there is sufficient evidence to lead to a conclusion that *use* of eGH by French is proven to the necessary degree of satisfaction. It then becomes a question of whether that conclusion should be altered because of the additional scientific evidence filed before this Panel but not before the first instance Arbitrator.

(a) scientific evidence in relation to use

71. At the request of the Hon. Anderson QC in connection with her inquiry Alexandra Gavrilidis, a senior scientist at Genetic Technologies was nominated to prepare DNA testing reports in accordance with NATA accreditation for Forensic Biology, DNA analysis. It appears that her instructions as to the testing were to report contact DNA, i.e. who had touched the item. Accordingly, she was not required to, and did not test the items for the presence of blood.

72. On request of the Hon. Anderson QC cyclists Dajka, Eadie and Kelly provided comparison DNA samples. French did not provide a comparison DNA sample. Gavrilidis statement in March 2005 states there were 230 items from the bucket tested. Of those items 74 were for a single source DNA profile. Of these single source profiles 67 were from a single "unknown' male, and 7 were matched to Dajka. Four of the 230 items tested yielded a mixed DNA profile, which was consistent with having been contributed by both the "unknown male" and Dajka. The DNA profiles obtained included those from two needles known as N5 and N6. The profiles from these needles were identical, and consistent with having been contributed by the unknown male donor.

73. Gavrilidis carried out the DNA testing on needle N5 and N6 by placing the capped needles in a tube containing a solution and vigorously swirling them to create what was called the washings. Her laboratory notes indicated that she could not remove the protective plastic caps from the needle. From the washings the DNA analysis revealed the unknown male's DNA profile.

74. Dr. Trout was sent the washings from the DNA test performed by Gavrilidis. In his third report of 26 October 2004 he confirmed that only the N6 needle could be considered under rigorous scientific standards to contain eGH. In the cross examination, Dr. Trout could not recall whether the needles were capped. The conclusion of Dr. Trout was that the washings from the N6 needle were heavily contaminated with eGH and would have unlikely arisen by cross contamination because of the non-absorbent nature of a needle or syringe. He, therefore, concludes that the N6 needle more likely than not contained eGH. However, in cross-examination he conceded that if the N6 needle was in or near the liquid residue in the bottom of the bucket it could be heavily contaminated for that reason and not necessarily by reason of eGH being in the needle and syringe.

75. The Respondents counsel submits that the DNA testing when combined with the other evidence as to French's access to the bucket, opportunity to use it and the like, leads to an overwhelming inference that it was French who was the "unknown male" in the Gavrilidis reports and therefore, it was he who used the substance eGH.

76. The Appellants filed one certificate of analysis and eight reports from three qualified experts refuting various parts of the scientific procedure and expert conclusions of the Respondents experts. The Respondents did not require any of the experts of the Appellant to be made available for cross-examination and they were not cross-examined in this proceeding. Thus, reports from Professor Barry Boettcher, a DNA specialist and of University of New Castle, Dr Jim Gerostamoulos, who is a Toxicologist and Pharmacologist at Victorian Institute of Forensic Medicine and Dr Bentley Atchison, a DNA specialist and a manager at Victorian Institute of Forensic Medicine, Molecular Biology section are accepted in this proceeding as filed.

77. Dr. Atchison and Dr. Gerostamoulos criticise the scientific conclusions of the Respondents experts because of the lack of security in regards to the chain of custody of the bucket. Dr. Atchison and Prof. Boettcher are critical of the methodology of the DNA testing. Prof. Boettcher raises criticism in respect of the conclusion that the presence of the eGH contained within the N6 needle.

78. The bucket passed through many hands after its discovery on 2 December 2003. At the outset it was partly stored in Dr. Barnes filing cabinet and later at the Forensic Science laboratory in Adelaide and the balance was sent to Dr. Trout's ASDT Lab facility for testing. The bucket was later taken to the CAS first instance hearing and afterwards to the law offices of the Respondents solicitors. It was produced at the first instance hearing in June 2004. In July the items in the bucket were sent to the lab of Gavrilidis and later the needles with their washings and various other parts of the bucket's contents were sent to Dr. Trout. There are many gaps concerning who handled the bucket, who had access to the bucket, its method of storage, and conditions of storage. Also of some importance in that it reveals the lack of careful preservation of evidence was that the initial review of

the contents with French by Dr. Barnes involved removal of some phials and handling of them with each having only one glove on their hands. Furthermore, there is no comprehensive detailing of the contents at the outset and then careful reconciliation of the contents at various stages where possession of the bucket and its contents is passed from one individual to another.

79. In cross-examination Dr. Trout agreed with Dr. Gerostamoulos statement of 11 May 2005 that *the issue regarding the chain of custody/chain of evidence of the bucket and its contents is significant.* Both Dr. Gerostamoulos and Dr. Atchison suggest that the continuity, the scientific term for chain of custody, is inadequate. This leads to lack of integrity in the testing of items for DNA and their value in proving the particulars of the doping infraction. Furthermore, the jumbling of all of the contents in the bucket together with a residue leaking to the bottom of the bucket means that each item tested can be and probably was cross contaminated with both DNA and eGH.

80. Gavrilidis conceded in an email exchange in August 2004 with a lawyer for the Anderson inquiry that it *is impossible to say whether the DNA was removed from inside or outside the needle.* This is because of the manner in which the testing was carried out. Therefore, it cannot be concluded that the needle N6 itself was injected into the unknown male who's DNA is identified on it. Any blood analysis on the needle and related materials for DNA was never undertaken and were not part of the instructions to Gavrilidis. The evidence does not establish that French used the N6 needle. Furthermore, the needle cannot be found to have contained eGH within it because of the cross-contamination arising from the manner of storage, the insecure and undocumented continuity and the fact that the testing lab had to rely on washings used by Gavrilidis which of necessity did not make any distinctions as to source.

81. Mr. Barry submits the proposition that even if the cross-contamination of the exhibits argument submitted by the Appellant is accepted, the only two candidates that could have used the eGH phials are Dajka or French as there is no other DNA profile found in the bucket. That proposition is not as simple as the submission would suggest. First, a DNA profile was obtained from only one-third of the items found in the bucket, with the user[s] of the remaining two-thirds of the items, remaining unknown. Second, of the items that disclosed a DNA profile, 20 percent of those items are doubtful based on the Respondent's expert Gavrilidis' interpretation as to the Relative Fluorescence Units {RFU} measurements. Consequently, the vast majority of the items in the bucket were absent of any DNA signature whatsoever which leaves open the possibility of use of those items in the buckets by individuals other than Dajka or French. Added to that is the evidence of Kelly, who admitted to injecting in French's room and presumably the used materials were deposited in the bucket. However, there is no DNA profile of Kelly in the items analysed from the bucket, and likewise there is a possibility that others might have used the bucket or deposited materials in it and no DNA profile registered. The state of the evidence is not satisfactory and is

totally insufficient to support any proposition as to who the unknown male may be.

82. Therefore, the Panel cannot agree with Mr. Barry when he submits that the overwhelming inference is that French is the unknown male. There is insufficient evidence and too many alternate explanations to make such an inference. The Panel does not have to make such a finding and will not when it cannot be established that the unknown male injected himself with the N6 needle or that the needle itself contained eGH. Therefore, we must conclude that the scientific evidence does not alter our previous conclusions on the direct testimony. As a result there is a failure to have proven *use* to the necessary degree of satisfaction. It cannot be found on the totality of the evidence, that French used eGH thereby breaching the CA Anti-Doping Policy. The particulars in relation to *use* of eGH are unfounded.

(ii) *Trafficking*

83. The CA Anti-Doping Policy provides a definition for Trafficking:

> ***"Trafficking"*** *means:*
>
> *(a) manufacturing, extracting, transforming, preparing, storing, expediting, transporting, importing, transiting, offering (whether subject to payment or free of charge), distributing, selling, exchanging, brokering, obtaining in any form, prescribing, commercialising, making over, accepting, possessing, holding, buying or acquiring in any manner the products or substances which are prohibited under this policy;*
>
> *(b) ....*
>
> *(c) being concerned in or involved in methods which are prohibited by this policy;*
>
> *other than in the course of the legal experience of a professional medical, pharmaceutical or analogous activities. A person, other than an Athlete, may rebut the presumption of trafficking arising out of mere possession of a substance prohibited under this policy if that person proves to the satisfaction of the ACF Anti-Doping Tribunal that the substance was for solely for personal use.*

Of relevance ***"Athlete"*** *means:*

> (a) *any person*
>
> i. *competing; or*
>
> ii. *who in pervious twelve (12) months has competed;*
>
> *in any competition under the control or auspices of ACF, or*
>
> (b) *any person*
>
> i. *using; or*
>
> ii. *who in the previous twelve (12) months has used;*
>
> *the facilities of ACF;*

84. At first instance it was concluded that mere possession of eGH by its presence in the bucket, in the absence of any personal use exemption, was sufficient to constitute evidence of breach of the Anti-Doping Policy in respect of trafficking. What is not addressed in that interpretation is whether something more than mere possession is required by the policy when dealing with trafficking. Arbitrator Holmes QC did say in connection with use that he was satisfied that French knowingly possessed eGH. This Panel has found that use was not established in respect of Testicomp or eGH for different reasons.

85. The CA definition of trafficking is a deeming provision. An athlete will be deemed by contract to have trafficked if they engaged, amongst other components in: *manufacturing, extracting, transforming, preparing . . . buying or acquiring in any manner the products or substances which are prohibited under this policy . . .* Implicit in such words is knowledge of the prohibited substance. One cannot manufacture a substance without knowing the substance that they are manufacturing. The same requirement of knowledge must be present when extracting, transforming or preparing a prohibited substance. What distinguishes any purchase of a substance from one that is prohibited by the definition is knowledge as to what the substance is that one is buying. Therefore, many of the component parts of the definition and deeming provision can only be applied with knowledge of the substance. When it comes to determining the meaning of *possessing,* that word as with the other component words in the definition must also be read as requiring knowledge despite the fact it is one of the illustrative words that might stand alone without requiring knowledge. If some of the component parts of the deeming definition must require knowledge implicitly then all the component parts must require knowledge by implication. Therefore, the CA definition must be read overall as requiring implicitly an element of knowledge within the definition. Parenthetically we note that the ASC policy makes knowledge explicit as part of its definition of trafficking.

86. Therefore, the Panel interprets the CA Anti-Doping Policy definition of *trafficking* as requiring some element of knowledge or intent in respect of the listed components that make up trafficking before deeming it to have occurred; unlike the situation with respect to *use* under the policy. In this regard, we respectfully decline to follow the interpretation of the CA Anti-Doping Policy at first instance. We interpret the CA Anti-Doping Policy in order to establish the Doping Offence of trafficking as requiring both possession and knowledge that one possesses the prohibited substance.[7]

87. At first instance, the Arbitrator with reference to the ASC charge of trafficking, stated that *I find that* [French's] *statement that he never had any knowledge of the use of illegal substances ... by others as implausible.* Further, he stated that he

[7] A helpful discussion of the concepts surrounding the interpretation may be found at Giles, *Criminal Law* (4th ed.) LBC Information Services, North Ryde, Australia 1997 at pages 46 and subsequent and at 775. See also *He Kaw Tey* (1985) 157 CLR 523.

did not accept [French's] *denial of knowledge of equine growth hormone in his room ... and find him knowingly involved in possession of ... equine growth hormone.* Mr. Hayes, the barrister for the Appellant, submits that there was no basis for the Arbitrator at first instance to make such a finding and asks us to intervene on a factual determination made at first instance. Before this Panel there is additional evidence in the form of the chain of custody, the new cyclist statements and scientific evidence submitted at the rehearing. Therefore, this Panel must form its own view on all of the evidence before it.

88. We have concluded above that the scientific evidence does not establish who used the eGH phials found in the bucket. Therefore, the scientific evidence fails to establish if French was knowingly in possession of eGH. The cyclist athletes' evidence before this Panel is consistent in that none of them admit to having taken eGH in French's presence and none of them admit to knowing anything about eGH. Mr. Hayes submits on the strength of that evidence that French could not have contravened the offence of trafficking as no one admits to injecting eGH in French's presence. There is the evidence of Dajka who as mentioned earlier, suspected that he received a horse vitamin B injection from French, and also that he recalls seeing two phials on top of French's fridge that were later identified to be eGH phials. As already mentioned, the Panel does not accept that self-serving testimony of Dajka. It follows that if there is no evidence of anyone injecting eGH in French's presence, and as found earlier that it has not been proven to the necessary degree of satisfaction that French has used eGH, then it cannot be said that French knowingly possessed eGH.

89. A question remains as to how French came into possession of the 13 eGH phials. Counsel for French paints a scenario that since the cyclists live in a college style dorm with doors open, anything can happen, with other people having the opportunity to deposit the eGH phials in French's room. There is evidence before this Panel that Dajka frequented French's room while French was absent. There is evidence from Eadie that it is possible that he accessed French's room during the week of 25 November 2003 to 2 December 2003 when French was not there. There is also the evidence of the labels of eGH phials ripped off. Such an act is consistent with a clandestine user of eGH and supports the assertion that it is possible that French may not have known that he possessed eGH. In any event, from the evidence before us and that was not present before the first instance Arbitrator, there is a possibility that the eGH phials could have been put in the bucket unbeknownst to French.

90. The Panel has interpreted the CA Anti-Doping Policy as requiring knowledge that one possesses a prohibited substance. The Panel finds that the requisite significant degree of satisfaction of proof that French knew he was in possession of eGH has not been established. In the absence of that knowledge the particulars of *trafficking* in eGH cannot be upheld.

(iii) *Aiding & Abetting*

91. This particular fails to have been established based upon the interpretation of the CA Anti-Doping Policy as it pertains to having the requisite degree of knowledge. In the absence of knowledge there can be no aiding and abetting under the policy. This matter falls away on the findings and conclusions above in (ii) on *trafficking.*

CONCLUSION

92. Based upon all of the foregoing this Panel has been unable to uphold the conclusions of Arbitrator Holmes QC at first instance save for the cross-appeal which, in being dismissed by this Panel, upholds the relevant finding of the Arbitrator. These proceedings have under the ASC and CA Anti-Doping policies been a rehearing and cross-appeal by order of the Panel under the CAS Rules. In such circumstances this award replaces that of the first instance award and becomes the final and binding award in this matter.

93. In replacing the first instance award it is necessary to terminate immediately the sanction of a period of ineligibility for two years because of the finding of a breach of the ASC and CA Anti-Doping policies. The concomitant result is that the fine of $1,000 Australian dollars imposed for breach of those same policies is without any foundation and must be returned to the Appellant.

94. At first instance the Arbitrator in the Final Award ordered that (i) a trek road bike belonging to the ASC be returned; (ii) financial assistance in the amount of $ 12,031.37 be returned to the ASC and (iii) costs of $20,000 be paid by the Appellant to the ASC towards their costs of the first instance proceedings. These matters and the costs of this rehearing and cross-appeal will be the subject of subsequent written submissions by the parties.

ORDERS

The Court of Arbitration for Sport therefore rules:

1. **The decision of Arbitrator Holmes QC at first instance be set aside and replaced with this decision of the Appeal Panel. As a consequence the two-year period of ineligibility imposed as a sanction is terminated immediately. As a further consequence the fine of $1,000 Australian dollars ordered to be paid at first instance is to be returned to French within one week of the date herein.**

2. **The first instance order to return the trek bike and $12,031.37 by way of an athlete scholarship are to be included in the written submission referred to in order number four below.**

3. **This being an appeal procedure this award is public under CAS Rule 59 unless the parties agree otherwise; and**

4. **Costs associated with the first instance decision; the interlocutory proceedings; and this appeal by rehearing and cross-appeal will be considered but on the principles of CAS international and the CAS Rule 65. Counsel are directed to make a written submission not exceeding 10 pages double spaced as to their costs and the matters referred to in order number two above within 15 days of this award.**

5. **The Court office filing fees paid by the ASC and by CA at first instance and the filing fee paid by the Appellant French each in the amount of $500 are retained by CAS.**

Professor Richard H. McLaren (President)
Arbitrator
11 July 2005
Lausanne, Switzerland

Henry Jolson QC
Arbitrator

The Honourable Allan W. McDonald QC
Arbitrator

Tribunal Arbitral du Sport
Court of Arbitration for Sport
CAS 2004/A/651

Interlocutory Award

Pronounced by the

COURT OF ARBITRATION FOR SPORT
OCEANIA REGISTRY

Sitting in the following composition:

Panel:
Professor Richard H. McLaren (President).
Henry Jolson QC
Allan W. McDonald QC

In the case of:

Mr Mark French

Represented by Mr Paul Hayes, Barrister
Instructed by Michael Main, Solicitor, Russell Kennedy Solicitors.

Appellant

Vs

Australian Sports Commission

and

Cycling Australia

Represented by Mr Robert Weber SC
Instructed by Mr Christopher Behrens, Mallesons Stephen Jacques Solicitors

Respondents

Court assisted by:
Mr Richard Redman, solicitor.

Date of Award: Monday 31 January 2005.

INTERLOCATORY RULING

BACKGROUND

1. In advance of a Directions Hearing held on 24 November 2004 the Second Respondent filed a document titled "SECOND RESPONDNT'S COUNTERCLAIM" {the Document}. The Appellant who characterized it as a cross-appeal took written objection to its contents and proposed course of proceeding. Oral submissions were made during the Directions Hearing. The President being unaware of the parties' correspondence prior to the Directions Hearing listened to submissions and then established a schedule for written submissions set out in the Order of Procedure issued subsequently.

2. The Order of Procedure permitted, on election by counsel, further oral submissions following the written process. Unfortunately that aspect of the procedure had to be altered due to the unexpected and unavoidable availability of one of the counsel. Therefore, the President made directions by consent setting out a timetable for written reply submissions. That process was complete on 23 December 2004.

3. On 20 December 2004 objection was taken to the composition of the Panel. As a consequence Justice Gyles elected to recuse himself from the Panel. On 25 January 2005 Henry Jolson Q.C. was appointed and the Panel was reconstituted.

COUNTERCLAIM/CROSS-APPEAL

4. By a document filed on 23 November 2004 the Second Respondent pursuant to Rule 55 counterclaimed. By its counterclaim the Second Respondent cross-appeals against a portion of the decision of Arbitrator Malcolm Holmes Q.C. in his Partial Award dated 8 June 2004. The counterclaim cross-appeal is in relation to:
   (a) the Arbitrator's finding that the second particular of alleged breach of the Cycling Australia Anti-Doping Policy {Policy}, namely an allegation that the Appellant used equine growth hormone, was not established;
   (b) penalty, but only in the event that the Arbitrator's finding at (a) is set aside or varied.

5. The relief sought is to have one aspect of the Partial Award varied to the extent the Arbitrator made a finding that the Appellant had not breached the Policy by using equine growth hormone. The request is for a substituted finding that the particulars of an alleged breach of the Policy

have been established on all the evidence. No other variations of the Arbitrator's findings are sought.

PARTIES' SUBMISSIONS

6. The issue to be determined is the scope of the CAS Rules of Procedure {Rules}. The Appellant characterises the Document as a cross-appeal, which the Second Respondent in its counterclaim acknowledges. On that characterisation the Appellant asserts it is late filed by 5 months because of the provision of Rule 49. The Appellant also notes that there is no appeal by them under Rule 48 with respect to the finding sought to be varied. The submission is that on their characterisation of the Document Rule 49 would have required the cross-appeal to be filed 21 days from receipt of the Partial Award appealed against. That deadline has long since past.

7. The Second Respondent characterises the same Document as a counterclaim within Rule 55. It submits the trigger date for filing had not yet been reached because the Appellant had not filed its Appeal brief under Rule 51 at that time. It is submitted there is no requirement in the CAS Rules for a separate proceeding to be filed in relation to such an issue as a right to a counterclaim. It is also submitted that the 'standstill agreement' reached in relation to the Anderson investigations and the CAS Appeal meant that the parties could have regard to material arising from the Anderson investigations and use such material in the appeal proceedings. Rule 57 supports the Panel having a full power to review the facts and the law.

8. There were also other submissions on "new evidence" and prejudice. Given the disposition by the Panel it is unnecessary to deal with these submissions at this time.

REASONS

9. The parties have agreed that this Appeal will be conducted by CAS according to the CAS Code (see Order of Procedure para no.2) and accordingly the law governing the conduct of the arbitration includes the Rules of Practice and Procedure set out in the Code: See *Raguz* v. *Sullivan & ORS* [2000] NSWCA 290.

10. The CAS Rules do not specifically provide for a cross-appeal after an initial appeal has been made within Rule 49. Therefore the CAS Rules are silent on the use of the words cross-appeal by which the Appellant characterises the Document. CAS Rule 57 provides for a *full power to review the facts and the law*. The French version reads *revoit les faits et le droit avec plein pouvoir d'examen*. The unofficial literal translation would be: review the facts and the law with full scope of examination.

Therefore, appeals that are contemplated within CAS Rules 48 & 49 must be interpreted to reflect the power of the Panel extended by CAS Rule 57. The French version provides for a slightly more complete explanation of that power.

11. If there is in fact a hiatus in the CAS Rules in respect of cross-appeals it can be filled by reference to Rule 55 to counterclaims. A counterclaim can include entitlement to any relief or remedy of plaintiff see 2.3 on p. 2 of Respondents materials. Therefore, the cross-appeal of the Second Respondent, can be found within the reference to counterclaim contained in Rule 55. Such an interpretation must be arrived at because of the Panel's power in Rule 57 to review the facts and law on appeal.

12. The Appellants Statement of Appeal is limited to *the offences and particulars that were found to be established against the Applicant.* The Respondent seeks to file a counterclaim under Rule 55. In the absence of any specific reference to a cross-appeal the word counter claim ought to be given a large and liberal interpretation to reflect the power of the Panel in Rule 57. The Panel finds that common usage and the various legal definitions of counterclaim referred to do not require that the Respondents only have the opportunity to join issue with the subject matter of the Appellant's appeal. The Respondent may review other aspects of the decision appealed from beyond merely joining issue with the Appellant's appeal. There is no requirement in the CAS Rules that the Respondent must make an independent appeal to reverse matters not established in the original decision.

13. The Second Respondent in fact filed its counterclaim/cross-appeal on 23 November 2004. That was before the Appellant had filed his appeal brief. The Second Respondent need not have filed its counterclaim/cross-appeal until after that step had been taken by the Appellant. In fact the Appellant filed its appeal brief on 20 December 2004. The fact that the counterclaim/cross-appeal was filed before the appeal brief had been filed does not affect the integrity of the act of the Second Respondent in filing its counterclaim/cross-appeal. We are of the view that the counterclaim which is by way of cross-appeal should be allowed to stand and able to be proceeded with by the Second Respondent.

ORDERS

The Court of Arbitration for Sport therefore rules:

1. **The counterclaim of the Second Respondent dated 23 November 2004, which is by way of cross-appeal from the Partial Award of Arbitrator Holmes QC be allowed to stand and proceeded with by the Second Respondent. The Panel reserves its decision to determine at the hearing what evidence it will receive and have regard to at the hearing and the cross-appeal;**

2. **This being an appeal procedure this award is public under Rule 59 unless the parties agree otherwise; and**

3. **Costs associated with this interlocutory proceeding will be considered at the time of considering the overall costs following the issuing of the appeal decision.**

Professor Richard H. McLaren (President).

Arbitrator

31 January 2005

London, Ontario, Canada.

Tribunal Arbitral du Sport
Court of Arbitration for Sport
CAS 2004/A/651

Interlocutory Award

Pronounced by the

COURT OF ARBITRATION FOR SPORT
OCEANIA REGISTRY

Sitting in the following composition:

Panel:
Professor Richard H. McLaren (President).
Henry Jolson QC
Allan W. McDonald QC

In the case of:

Mr Mark French

Represented by Mr Paul Hayes, Barrister
Instructed by Michael Main, Solicitor, Russell Kennedy Solicitors.

Appellant

Vs

Australian Sports Commission

and

Cycling Australia

Represented by Mr Robert Weber SC
Instructed by Mr Christopher Behrens, Mallesons Stephen Jacques Solicitors

Respondents

Court assisted by:
Ms. Caroline Adler &
Mr Richard Redman, solicitor.

Date of Award: Tuesday 30 March 2005.

INTERLOCUTORY RULING

BACKGROUND

This Panel entered the following Interlocutory Ruling on 31 January 2005:

> ***The counterclaim of the Second Respondent dated 23 November 2004, which is by way of cross-appeal from the Partial Award of Arbitrator Holmes QC be allowed to stand and proceeded with by the Second Respondent. The Panel reserves its decision to determine at the hearing what evidence it will receive and have regard to at the hearing and the cross-appeal.***

1. **In furtherance of the above Ruling, a further interlocutory hearing was held on 22 March 2005. All parties and two members of the Panel convened at the offices of Allen Arthur Robinson in Melbourne with the President joined by videoconference link from Canada. The purpose of this hearing was to determine what evidence the Panel would receive in advance of the hearings now scheduled for the 20th to the 22nd of May 2005 in Melbourne.**

2. **In the appeal proceedings the Appellant filed his Appeal Brief on 20 December 2004. The Respondents filed their brief in accordance with the Procedural Order governing these proceedings on 11 March 2005. This was the first opportunity for the Appellant to understand the full range of evidence to be called on the cross-appeal the right to which had been confirmed in the previous interlocutory ruling of the Panel referred to above.**

3. **The Appellant objected to the evidence proposed by the Respondents in various witness statements. The proposed evidence on the cross-appeal for present purposes is divided into two groups. One is lay evidence largely comprising statements from various cyclists and the other is scientific evidence relating to certain DNA matters associated with the bucket of syringes and other paraphernalia.**

4. **Stemming from the original Procedural Order of this Appeals Panel and of the rules of both the Australian Sport Commission {ASC}, the First Respondent and Cycling Australia {CA}, the Second Respondent, the parties have a differing view of precisely what constitutes a rehearing appeal when there is also a cross-appeal against a portion of the decision of Arbitrator Malcolm Holmes Q.C. in his Partial Award dated 8 June 2004.**

5. The Appellant objects to both the lay and scientific evidence intended to be called by the Respondents. He does so on the basis of what constitutes a rehearing appeal and on the proposed contents of the evidence itself. He takes further issue with the appropriate law to be applied by this Panel to govern admissibility of such evidence in the event there is to be such evidence.

WHAT IS A REHEARING APPEAL FOR A CAS OCEANIA APPEAL PANEL?

6. The substantive law for the merits of this matter is agreed to be the law of New South Wales as set out in paragraph 6 of the Order of Procedure. The Anti-doping Policy of the First Respondent ASC in clause 10.2 and the similar policy of the Second Respondent in clause 12.3 {hereafter collectively "the Relevant Rules of the Respondents"} provide that any appeal will be to the CAS Appeals Division, which in this case is administered by the Oceania Registry of CAS. This Panel is constituted under the Code of Sports-related Arbitration {CAS Rules}. The Panel has the jurisdiction conferred upon it by the parties' contract with the Appellant Athlete that in turn brings into play the Relevant Rules of the Respondents.

7. Those Rules make reference to a right to appeal that is described as a *rehearing* or *will rehear* {hereafter referred to merely as *rehearing*}. The Appellant submits that the CAS Rules are silent as to the principles to be applied with respect to the introduction of evidence on appeal. The Appellant submits that either as a matter of the law of procedure of the arbitration; or, by way of filling-in any hiatus in the CAS Rules that Australian law as to the admissibility of "new" evidence on an appeal by way of rehearing ought to be applied. Implicit in those submissions is the issue of the law of procedure of this arbitration. The Respondents submit that the contract between the parties calls up the CAS Rules as to the manner by which the appeal will be conducted. Those Rules make it beyond doubt that a *rehearing* is not limited in the way in which the Appellant contends.

8. The parties' reference to a *rehearing* in the Relevant Rules of the Respondents raises the meaning of that word and the party's intention in choosing it. In the book *Civil Procedure Victoria* by N.J. Williams QC (Butterworths, Australia 2000) beginning at paragraph 64.01.120 the various possible meanings and nature of what an appeal generally constitutes in Australia are described and explored by the author. What that reference indicates is that there is no universal common meaning to the word *rehearing*. One of its meanings certainly maybe in the correct context that is espoused by the Appellant as part of the law of Australia.

9. In our previous Interlocutory decision the Panel concluded at paragraph 11 that:

> CAS Rule 57 provides for a *full power to review the facts and the law*. The French version reads *revoit les faits et le droit avec plein pouvoir d'examen*. The unofficial literal translation would be: review the facts and the law with full scope of examination. Therefore, appeals that are contemplated within CAS Rules 48 & 49 must be interpreted to reflect the power of the Panel extended by CAS Rule 57. The French version provides for a slightly more complete explanation of that power.

10. Having reached the foregoing conclusion it was further concluded that the CAS Rules permitted the cross-appeal as set out in our prior decision and referenced at the outset herein.

11. The CAS jurisprudence on Rule 57 describes the appeal jurisprudence in the following terms. In *N., J., Y., W. c/ Fédération Internationale de Natation (FINA)*, CAS 98/208, President Michael Beloff QC enunciated that the CAS Panel is not limited to consideration of evidence adduced or arguments advanced before first instance or the appellate stage. Rather, the CAS Panel is to "*consider all evidence, oral documentary and real, produced before it... The hearing is a rehearing.*" See also: *P. c/ International Equestrian Federation (FEI)*, CAS 98/184; *B. c/ Internationale de Natation (FINA)*, CAS 98/211; *H. c/ Fédération Internationale de Motocyclisme (FIM)*, CAS 2000/A/281.

12. The parties in using the word *rehearing* in the Relevant Rules also juxtaposed the reference to the CAS Rules. In so doing the Panel finds the parties intended to bring into play or call up the appeal procedure contemplated under the CAS Code. Thus, *rehearing* as used in the parties' contract when read in context takes its meaning from the CAS Code and its related jurisprudence as being the parties' intention.

13. An appeal in the CAS Appeals Division, as the jurisprudence and Rules 57, 51 and 55 indicate, calls for a hearing, which in many jurisdictions would be described as a hearing de novo. By that it is meant that if the appeal raises a question of fact this Appeals Panel is not restricted to the evidence before Mr. Holmes, QC. The parties here have elected not to have a trial over again and agreed that the evidence of the first instance will be taken as evidence before us. See the Order of Procedure at paragraph 2. However, fresh evidence may be adduced as of right under the CAS Rules. That proposition stems from the prior conclusion of this Panel that there is a right to a cross-

appeal within the CAS Rules. The issue is upon what basis is that evidence admissible in the appeal or in the cross-appeal.

ADMISSIBILITY OF NEW EVIDENCE

(i) Lay Evidence

14. The fresh lay evidence sought to be relied upon by the Respondents consists of statements from five cyclist athletes and one other individual. The Appellant describes this evidence as "new" and submits it is not within a *rehearing* appeal because the evidence was available to the Respondents at first instance. It is submitted that in essence the statements are not new evidence because it was available and could have been called at first instance and an election was made not to call the evidence.

15. The first instance hearing is not prosecutorial in nature as submitted by the Appellant. The role of the Arbitrator is one of determining if there has been an infraction of the contractual agreement between the parties that would amount to a Doping Offence. A sanction for a Doping Offence may be applied by way of and because of the contractual agreement. An athlete has agreed by contract not to do certain things and when they do the consequences of that breach will be as prescribed in terms of sanctions. The purpose of the prosecutorial characterization of the Appellant is to raise the level of fairness and the issue of prejudice with regard to the lay evidence. However, the matters before this Panel are contractual in nature and accordingly the general principles of fairness are to be applied. The rules of evidence in a rehearing appeal are to be guided by the principles of relevant evidence within the context of a fair procedural process.

16. At first instance Mr. French in his written statement denied any knowledge of the vials or the use of equine growth hormone {eGH} by him or any knowledge that anyone else used such a substance. He denied placing the vials in the bucket and stated he had no knowledge of who did. However, he did implicate the other five cyclists in his *viva voce* evidence. All of that testimony will be before the Panel on appeal because of the Order of Procedure at paragraph #2 permitting that: "evidence from the first hearing may be included in the Appeal Brief".

17. The lay evidence responds to Mr. French's denial and it was not called at first instance. This Panel has already found that the word *rehearing* in the Relevant Rules are intended to have the meaning of the CAS Code and its jurisprudence and not the specialized meaning contended for by the Appellant. Therefore, as this Panel has found, there is a right in a rehearing to call fresh evidence by way of appeal or cross-appeal. In the face of what will be a continued denial of knowledge by Mr. French, this

Panel would be not hearing all of the relevant evidence if it determined that the lay evidence is not admissible. There is no prejudice to the Appellant because the Respondents exercise their right to call fresh evidence that is in the nature of a rehearing under the CAS Rules. Additionally, the Appellant will have the opportunity to challenge the validity of this lay evidence through cross-examination. If this matter was characterized as prosecutorial in nature, prejudice might have to be examined. However, this proceeding is strictly contractual in nature. It is neither procedurally nor substantively unfair in a rehearing under the CAS Rules to permit the Respondents to present the proposed lay evidence. The Panel rules the lay evidence admissible under the CAS Rules for an appeal by rehearing.

(ii) Expert Scientific Evidence

18. The scientific evidence consists of three persons and is related to the scientific testing of the contents of the bucket. The thrust of that evidence is related to the DNA profiles found on the paraphernalia in the bucket. The Respondents submit that they are entitled to call this evidence under the CAS Rules on an appeal by way of rehearing. The evidence itself as it pertains to the DNA was obtained after the hearing at first instance and was provided to a later inquiry identified before us and conveniently referred to as the Anderson Inquiry. The Appellant submits that a choice was made at the outset at first instance not to have obtained such evidence and thus not to call it. The Appellant alleges it is an inherently unfair procedure to now permit the calling of that evidence and that it materially prejudices the Appellant's appeal.

19. The purpose of the scientific evidence is to provide the trier of fact, which in this case is this Panel, with the necessary technical or scientific basis upon which to properly assess the evidence presented. In this way the DNA evidence is tied to the proposed lay evidence. This Panel concludes that the expert evidence is relevant and is within the proper sphere of being expert evidence. There is no unfairness in permitting the evidence to be called in a *rehearing*. The difference in the position of counsel is more on the value of the evidence and on the ability of the Appellant to respond to the proposed scientific evidence by way of engaging its own expert. This latter point is submitted by way of fairness or prejudice or both.

20. It is premature for this Panel to rule on the cogency and value of the scientific evidence. To do this the Panel needs to hear the evidence, see the cross-examination and then draw its conclusions based on the witnesses' evidence and not the submissions of counsel as to what the evidence may be. This part of the Appellant's argument is more on the weight of the evidence than upon its admissibility *per se*. That weight will be affected by the facts upon which the expert evidence is based.

21. **On the rehearing of this matter and particularly on the cross-appeal the scientific evidence is relevant. Issues that may have arisen by the deterioration of the contents or chain of custody of the bucket and its contents since it was seized in December of 2003 and later analysed in July of 2004 and the conclusions to be drawn from it are matters to be considered and determined on the *rehearing*.**

22. **If the expert evidence is to be ruled inadmissible it would have to be on the basis of prejudice. That assessment not being at the standard that might be set in a prosecutorial case as previously discussed. The conclusion that the evidence is admissible as part of the cross-appeal precludes an in-depth analysis on prejudice in order to not allow this scientific evidence to be admitted. It is procedurally fair to admit this evidence because the Appellant will have an opportunity to challenge the weight and the value of the evidence, thereby reducing or eliminating the reliability of the evidence. There is also sufficient time to engage an expert for the Appellant who can put in their report on some of these issues. The Appellant has some six to seven weeks to obtain such evidence if they so desire.**

23. **To the extent that the Appellant has objected to certain portions of the intended evidence of lay witnesses, if their evidence is given, the admissibility or otherwise of such portions shall be determined on the rehearing.**

ORDERS

The Court of Arbitration for Sport therefore rules:

1. **The lay evidence and the scientific evidence of the Second Respondent is admissible in the rehearing on cross-appeal.**

2. **This being an appeal procedure this award is public under Rule 59 unless the parties agree otherwise; and**

3. **Costs associated with this interlocutory proceeding will be considered at the time of considering the overall costs following the issuing of the appeal decision.**

Professor Richard H. McLaren (President).

Arbitrator

30 March 2005

London, Ontario, Canada.